Supreme Court, U.S.
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No. 98-204

In The

Supreme Court of the United States

October Term, 1997

MAMMOET SHIPPING, *et al.*,

Petitioners,

vs.

SKY SHIPPING LTD and
ITEL CONTAINER CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ITEL CONTAINER CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review a decision of the Eleventh Circuit Court of Appeals which was based upon interpretation of a particular maritime contract of carriage choice of law provisions and where there was no conflict between the circuits and where the decision had no overall effect upon the maritime industry.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Itel Container Corporation, has no parent company and no nonwholly owned subsidiaries.

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Other Authority Cited:

Moore's Federal Practice § 510.41[3] 5

STATEMENT OF THE CASE

Itel Container Corporation ("Itel") is not listed as a Respondent in Petitioner Mammoet Shipping B.V., et al.'s (Mammoet) Petition for Writ of Certiorari. However, pursuant to United States Supreme Court Rule 12(6), Itel is to be considered as a Respondent.

Petitioner Mammoet's direct claim in this Court is against Respondent Sky Shipping Ltd. Reversing the United States District Court, the Eleventh Circuit found in favor of Respondent Sky Shipping Ltd. appeal against Petitioner Mammoet. The Eleventh Circuit Court of Appeals affirmed the United States District Court's judgment in favor of Respondent Itel against Respondent Sky Shipping Ltd. Sky Shipping Ltd. did not file a Petition for Writ of Certiorari against Respondent Itel.

Itel brought this maritime cargo damage/loss action against Petitioner Sky Shipping, Ltd., f/k/a Candyline, a non-vessel operating common carrier (NVOCC) and against Petitioner Mammoet Shipping BV, et al, the owner/operator of the M/V TITAN SCAN. The action involved loss/damage to new refrigerated ocean containers, purchased by Itel and being transported on Petitioner's vessel from Japan to Savannah, Georgia.

Having purchased 198 refrigerated containers from Japan, Respondent Itel contracted with representatives of Petitioner Candyline in London for transportation of the containers from Japan to Savannah, Georgia. Personal negotiations and execution of the contract of carriage between Itel and Candyline's representatives occurred in London, the sole place of doing business of Respondent Candyline.

As the Eleventh Circuit Court of Appeals noted, the terms and condition of the Itel-Candyline contract were set forth in a Conline Booking Note (Opinion, p. 2). In addition to standard boilerplate terms, the Conline Booking Note contained an addendum. Clause 10 of the addendum stated as follows: "English law to apply."

The subsequent ocean Bill of Lading prepared by Candyline's agent in Japan incorporated by reference the Conline Booking Note which had been negotiated, prepared and executed in London. The relevant Bill of Lading language stated as follows: "Terms and conditions as per Conline Booking Note dated 30th August 1990" (R.2-46-5, 6 at ¶ 24). The Bill of Lading contained a General Paramount Clause. Additionally, Clause 3 contained a forum selection and choice of law Clause — the country where the carrier had its principal place of business, i.e., England. As the parties stated to the Eleventh Circuit at oral argument, the parties waived the choice of forum provisions and proceeded to trial in the United States District Court, Southern District of Georgia.

After executing the Itel contract in London, Respondent Candyline, as a NVOCC, executed a separate contract of carriage with Petitioner Mammoet. Candyline and Mammoet executed a Conline Booking Note containing terms similar to those in the Itel-Candyline Booking Note.

Following the loss/damage to its containers, Itel brought this action. Respondent Candyline filed a cross-claim for indemnity against Respondent Mammoet, the actual operator of the M/V TITAN SCAN. Construing the provisions of the respective contracts of carriage, the District Court held that English substantive law applied to the Itel-Candyline dispute. Accordingly, the District Court held that England's Hague-Visby Rules applied. These rules, thus, governed Candyline's

liability to Itel. On the contrary, Candyline had asserted that the Japanese Carriage of Goods by Sea Act were applicable to the Itel-Candyline dispute. Finding that Candyline was entitled to indemnity from Mammoet, the District Court held that United States Carriage of Goods By Sea Act applied in that contractual claim.

On appeal, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court on the Itel-Candyline contract, i.e., that England's Hague-Visby Rules applied. However, reversing the District Court's opinion on the Candyline-Mammoet Contract of Carriage, the Eleventh Circuit held that the Hague-Visby rules applied. On remand, the District Court modified its previous judgment in the Candyline-Mammoet indemnity action to reflect application of the Hague-Visby Rules.

SUMMARY OF THE ARGUMENT

In its decision, the Eleventh Circuit Court of Appeals reviewed the District Court's interpretation of choice of law provisions contained in the Itel-Candyline and in the Candyline-Mammoet contracts of carriage. Thus, the opinion was based on concepts of contract construction.

In support of its opinion, the court referred to several somewhat analogous district court opinions. Moreover, the Eleventh Circuit's decision did not involve resolution of any constitutional issues; nor did it involve matters of broad national application. Moreover, in resolving issues of maritime contract law, the Eleventh Circuit decision did not create a conflict between the Eleventh Circuit and other circuit courts of appeal. In point of fact, there is no other similar circuit court of appeal decisions on the issues, i.e., interpretation of choice of law provisions in these ocean contracts of carriage.

Inasmuch as the substance of the Petition did not encompass any of the designated considerations governing Review On Certiorari enunciated in Supreme Court Rule 10, the Petition should not be considered.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE DECIDED BY THE ELEVENTH CIRCUIT COURT OF APPEALS IN CONSTRUING A PROVISION IN A MARITIME CONTRACT OF CARRIAGE DOES NOT MEET THIS COURT'S REQUIREMENTS FOR CONSIDERATION OF A PETITION FOR CERTIORARI.

A. The Eleventh Circuit Court Of Appeals Decision Does Not Conflict Either With Another United States Court Of Appeals Decisions, Or With A Decision Of A State Court Of Last Resort. Thus, Petitioners Have Failed To Meet The Requirements Of Supreme Court Rule 10(a).

Construing the provisions contained in the Petitioners' back to back contracts of carriage, the Eleventh Circuit held that England's Hague-Visby Rules governed the rights of the respective parties to the two contracts of carriage. Accordingly, the Hague-Visby Limitation of Liability provisions controlled the respective carriers' liability. As reference for its opinion, the Eleventh Circuit referred to various district court opinions, e.g., *Insurance Co. of N. Am. v. s/s SEALAND DEVELOPMENT*, 1990 AMC 2967, 2970 (S.D. N.Y. 1989) (proposition that specific clauses of a contract pre-empt form provisions). In the Itel-Candyline Conline Booking Note, the Eleventh Circuit gave priority to the specific clause which dictated application of English substantive law. Moreover, other portions of the opinion centered on general principles of contract construction,

i.e., whether the parties intended for the Hague-Visby Rules to apply.

Notably, the Eleventh Circuit decision did not create a conflict with any other federal circuit court of appeals decision. For these reasons, Petitioners have failed to meet the requirement of United States Supreme Court Rule 10(a).

B. The Eleventh Circuit Court Of Appeals Decision Does Not Involve Any Important, Unsettled Question Of Federal Law.

To reiterate, the Eleventh Circuit's opinion centered around traditional principles of contract construction. Construing various provisions of the contracts of carriage (Conline Booking Note) and the Bill of Lading, the court found that England's Hague-Visby rules governed the rights of the contracting parties.

As the authors of Moore's Federal Practice have observed, "The importance of an issue is not necessarily measured by its impact on the litigants but its contribution to the development of national law." § 510.41[3]. The authors further noted that increasingly this Court has shaped its caseload toward constitutional issues, e.g., *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 119 L. Ed. 2d 121 (1992) (involving an interpretation of the Commerce clause as applied to hazardous waste disposal fee). In matters not involving constitutional issues, this Court has granted Certiorari where uniformity of a federal law is at issue, e.g., *Ernst & Ernst v. Mochfelder*, 425 U.S. 185, 193 (1976) (whether a private cause of action under 10(b)(5) exists).

As stated previously, the case involves neither a constitutional issue nor a general issue of uniformity. Rather,

the issue was simply one of contract construction, i.e., construction of the particular language in two related contracts of carriage. Accordingly, the decision is not of such great importance that its effect will be widespread on the maritime industry. For these reasons, the Petition does not meet the requirements of the United States Supreme Court Rule 10(c).

CONCLUSION

Based on the foregoing, Respondent respectfully submits that this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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